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THE ROLE OF THE PER DIEM ARGUMENT IN PERSONAL INJURY SUITS

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INTRODUCTION

With increasing frequency, appellate courts across the country are being forced to decide the propriety of counsel for the plaintiff utilizing a formula, or per diem approach, when discussing damages for pain and suffering in closing argument. Until a few years ago, this technique seems to have excited little attention, and to have generated few appeals. The steady rise in automobile accidents, the increasing amount of personal injury litigation, and the tendency of the courts to scrutinize carefully every procedure that might detract from a fair trial, have combined to bring this type of argument to the attention of the courts, with the result that today, few other non-substantive techniques have commanded as much appellate attention.

Like many other subjects in the personal injury field, the per diem argument is viewed in one light by organizations representing defense counsel, and in another light by the national organization representing plantiffs' counsel. For example, the Defense Research Institute lauded a Wisconsin decision that disapproved the per diem technique, and claimed that the decision freed "thirty million Americans . . . of the threat of this forensic gimmick."[1] A similar decision was not viewed as sanguinely by NACCA, representing counsel for plaintiffs, which complained that this "lamentable decision went far to leave the unassisted jury wrapped in a Grand Banks fog."[2] Thus, the opposing forces have mobilized along predictable lines, with claimants' attorneys praising the argument, and defense counsel condemning its use.

Despite the controversy it has aroused, the per diem technique is still a widely-used and frequently effective weapon in the arsenal of plaintiff's counsel, although a distinguished plaintiff's lawyer has advocated its abandonment,[3] and other prominent plaintiff's advocates have turned their ingenuity to the development of other persuasive procedures.[4] Nevertheless, the continued and widespread use of the procedure during the trial of civil suits demands that proper attention be given to its appropriateness in achieving an intelligent and orderly resolution of civil litigation. The purpose of this article is to probe the historical background of the procedure,

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1. 14 U. FLA. L. REV. 189 n.3 (1961).

2. 25 NACCA L.J. 60, 68 (1960).

3. LEVINE, PERSONAL INJURY ANNUAL (1965).

4. SAMS, PERSONAL INJURY ANNUAL (1963); APPELMAN, PERSONAL INJURY ANNUAL (1962).

and to weigh and balance the arguments of both the advocates and of the critics of the technique. Since the per diem argument is a persuasive device whose effectiveness is difficult to evaluate, no consideration will be given to the question of whether or not resourceful counsel should resort to its use. This article will deal only with the question of whether or not the per diem argument has an appropriate role to play in the fair disposition of our civil litigation.

The controversy has arisen out of two basic and typical situations. The first, and most common, is the use by counsel, ordinarily representing the plaintiff, of a formula in his closing argument to the jury. The formula can comprise either a statement by counsel of his belief as to the value of the pain and suffering experienced during a given time period, such as per hour or day, combined with a suggestion that the figures be used in a formula for calculating the damages, or it can consist merely of a suggestion by counsel, without the expression of his personal opinion as to value, that the jury base their evaluation on some per diem figure in conjunction with a formula. As used in the ordinary case, the technique involves two distinct suggestions—an amount and a method of computation. The other situation arises when the jury, or judge sitting as fact-finder, actually employs this technique, with or without encouragement by counsel.[5] The latter situation will not be considered in this article.

The classic example of this argument is presented in Belli, *Modern Trials*, 1963 (Abridged Edition). The technique, as utilized and popularized by Mr. Belli, has been described by him below:

> Rather than start at an absolute figure, let us start at the other end and break pain and suffering into finite amounts. We do this by showing the line, "1952 to 1982," as being plaintiff's life line, his thirty years. We break this down into days, hours and seconds. If one will, there are 31,536,000 seconds in a year. (Counsel may multiply this times a thirty-year life expectancy). . . . When it is broken down into seconds and minutes, then a jury begins to realize the real meaning of this permanent pain and suffering of which doctors have spoken, and that $60,000 at $5 a day, is not an excessive award. . . . Jurors must start thinking in days, minutes and seconds and in $5, $3, and $2 so that they can multiply to the absolute figure. Perhaps a juror will feel that $5 a day is not enough, that it should be $10 a day. A juror may believe it should be $4 or $3 a day. At least he has started thinking, and when he follows this system of multiplication he comes to a substantial figure that must be fair, because it is as factual as we can go.[6]

5. 60 MICH. L. REV. 612 (1962).

6. BELLI, MODERN TRIALS 345-346 (abridged ed. 1963).

At the bottom of the controversy over the use of this technique lies a fundamental policy consideration. Basically, the courts confronted with the question of the propriety of the formula approach have to resolve the far more rudimentary question of whether the traditional practice of curtly telling the jury that the test of damages for pain and suffering is a "reasonable amount" remains the best of a bad assortment of alternatives, or whether counsel should be permitted to deal in specific measurements of time and value, and to conduct a more far-reaching inquiry.[7]

The vagueness of the traditional measure of damages communicated to the jury by the court in its charge, and presumably used by the jury in the final determination of its award, itself raises concomitant policy considerations. A fundamental question arises as to whether or not it is fair to permit the potentially large sums of money frequently involved in personal injury cases to be subject to the ambiguities and insufficiencies of the traditional standard.[8] The victim of a tragic and permanently incapacitating injury who finds himself in a court using the traditional standard may find his economic future being decided by a jury that has been enjoined by the court to give a "reasonable" award, but which has been given no criterion to assist in the decision-making. If the jury is sufficiently sympathetic, the plaintiff in such a situation may be the beneficiary of the jury's largesse; if offended by some quirk of his personality, the jury may award him his "special" damages but no fair compensation for the misery he has experienced, and which may even have produced the personality defect. In either case, the verdict is basically "unreasonable" because it is a product of guesswork and whimsy rather than a rationalized figure.

A second consideration, also central to any intelligent analysis of the per diem technique, revolves around the question of whether or not a tort-feasor, having inflicted the harm for which damages are sought, should be permitted to deny the victim of his wrong a possibly appropriate and valuable tool. It is only after the jury has decided the initial question of responsibility that it is forced to decide the question of damages. Thus, by the time the jury considers the validity of the per diem argument made by counsel, it has already made up its mind that the defendant's negligence produced the injury. At this point, it could be argued, the injured party should have the benefit of any procedure that can assist the jury in assessing an award against the responsible party. Traditionally, the law provides that a party whose misconduct renders the ascertainment of precise damages difficult cannot complain of the uncertainty.[9]

These two considerations are frequently overlooked or ignored by the

7. Ratner v. Arrington, 111 So. 2d 83 (Fla. 1959).
8. 6 SYRACUSE L. REV. 27, 39 (1954).
9. Annot. 60 A.L.R. 2d 1331, 1348 (1958).

courts required to pass upon the validity of the technique. In some cases, the courts have been diverted by a confusion of the per diem approach with the "Golden Rule" argument, which has been almost universally condemned. This confusion is exemplified in a number of the early Pennsylvania cases, which will be discussed *infra*. In other cases, the courts have mustered a host of flimsy and superficial reasons in support of their decision to reject the use of the argument, while the actual motivation of the court is the unspoken but real fear that use of the formula technique will have a mesmeric effect on juries, and lead to excessive awards.[10] This last consideration is perhaps the principal objection to the use of the formula technique, even though it is rare that this argument is articulated by the courts.

In the subsequent sections of this article, the historical sources of the controversy will be considered, as well as the arguments mustered by both sides. A thorough review of the existing case law will indicate the magnitude of the divergence of opinion, and the manner in which the courts have dealt with, and frequently by-passed, an analysis of the considerations discussed above.

HISTORICAL BACKGROUND

Until the early 1950's, the per diem argument, as well as other blackboard techniques of persuasion, had received little appellate attention.[11] Prior to 1951, the propriety of the per diem argument had been considered only by the appellate courts of Pennsylvania, which had followed a consistent policy proscribing use of the formula technique.[12] Other states apparently were not bedeviled by the problems raised when the technique was used, although this situation quickly changed after 1951.

In the 1950's more and more cases involving the per diem technique began to appear on the dockets of the appellate courts. This sudden emergence of the procedure as a substantial issue on appeal was due to a number of factors; the most important of these undoubtedly was the increased use of the technique due to the encouragement of men like Mr. Belli and other leaders in NACCA, which was evolving into a powerful spokesman for plaintiff's lawyers at the time. Since then, few other non-substantive problems have commanded as much attention from our appellate courts.

Several generalizations can be made about the early Pennsylvania decisions, before they are reviewed in detail. The Pennsylvania courts of that by-gone era, in decisions reflecting the conservatism of the age, arrogated to itself a broad supervisory power over jury verdicts. Though

10. 14 U. FLA. L. REV. 189, 191 (1961).

11. BELLI, MODERN TRIALS 327 (abridged ed. 1963).

12. 41 B.U.L. REV. 432 (1961).

paying lip service to the authority of the jury to render a fair award, the courts made it clear that the award had to be reasonable, and that the reasonableness of the award was to be decided, in the final analysis, by the appellate courts. Shining through the early Pennsylvania decisions is the unspoken fear of the courts that juries could not be trusted, and that severe limitations had to be placed on their ability to award plaintiffs large sums of money for such essentially indefinable items as pain and suffering.

In addition, the early Pennsylvania decisions reflect the intertwining of the "Golden Rule" argument and the per diem technique that was mentioned previously, and the confusion of thought that arises when a court does not distinguish these two distinct arguments. This intermingling of two essentially similar but separate persuasive techniques is manifested in the early Pennsylvania decisions in two ways. Thus, in some decisions, the courts explicity confused the per diem technique with the "Golden Rule" argument, and condemned the per diem technique on the ground that it is improper to suggest that the jury stand in the shoes of the plaintiff in assessing damages for pain and suffering. (The Golden Rule argument.) In the majority of cases, the courts confused the two arguments in a far more subtle fashion. Running like a red thread through many of these early decisions is a serious semantical discussion, continuously carried on by the courts, in an attempt to distinguish the concept of "compensation" from the concept of "worth" or "price." Basically, the courts regarded "compensation" as the correct phrase to be used when discussing damages for pain and suffering, on the ground that compensation connoted the idea of an allowance that a stoical jury was to give to an injured plaintiff for the injury and misery he sustained. On the other hand, the phrases "prices" or "worth" were considered pejorative, presumably because they invited the jury to think of pain as an item that could be bought and sold. Apparently, the courts feared that if the jury thought of pain and suffering in terms of the market place, the jury would place itself in the shoes of the injured plaintiff and would award the amount that it would take for the plaintiff's pain. In a subtle and indirect form, this semantical distinction is the "Golden Rule" argument repeating itself.

Collins v. Leafey[13] is commonly cited as the first Pennsylvania case dealing with the per diem argument. However, like the scores of cases coming after it, the *Collins* case is only part of an evolutionary process whereby the Pennsylvania Supreme Court defined its conception of the measure of damages to be allowed for pain and suffering. Nevertheless, even though not explicitly condemning the per diem practice, the court, in *Collins* and the cases following it, left no doubt that it would not

13. 124 Pa. 203, 16 Atl. 765 (1889).

approve the technique. But it was not until *Bullock v. Chester & Daily Telford Road Co.*,[14] decided in 1921, that the Pennsylvania Supreme Court first came to grips with the underlying rationale of the per diem approach, and expressed its criticism of the conceptual basis of the argument.

In *Collins*, the court criticized the charge of the lower court, not because it represented a distorted interpretation of the applicable law, but because the lower court had not forcefully impressed the jury that their award was to be limited only to compensation. The court itself made no attempt to define compensation. Indeed, the lower court had instructed the jury that their verdict was to be compensatory. Apparently, however, the court felt that one iteration of the word was not enough to overcome the possible generosity of the jury toward the plaintiff.

The oversight of the court in *Collins*, in failing to define "compensation" as the standard for an award for pain and suffering, was repaired by subsequent decisions of that court. Starting with *Baker v. Pennsylvania Co.*,[15] the Pennsylvania Supreme Court began a semantical discussion of the meaning of this term which was to culminate in its drawing an elaborate distinction between "compensation" and "price" or "worth," and then end with the court eradicating the artificial distinction so laboriously worked out in this long line of cases.

The *Baker* case is interesting because of its historical role in the development of Pennsylvania's position in opposition to the per diem technique. The decision sharply distinguishes compensation from price or worth, and condemns the latter terms when used in defining the standard of damages. It explicitly and implicitly confuses the "Golden Rule" argument with the per diem technique. Finally, it completely asserts the supervisory power of the court over jury verdicts.

In *Baker*, the lower court had instructed the jury that:

> It is of course difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured, for any amount of money. But it is the duty of the jury, if they find for the plaintiff, to fix some sum which would be compensation for this pain and suffering.[16]

In condemning this apparently innocuous instruction, the court drew a sharp distinction, for the first time, between "price" and "compensation:"

> There is no market in which the price of a voluntary sub-

14. 270 Pa. 295, 113 Atl. 379 (1921).
15. 142 Pa. 503, 21 Atl. 979 (1891).
16. 142 Pa. at 503, 21 Atl. at 980.

> jection of one's self to pain and suffering can be fixed. There is no market standard of value to be applied, and to suggest the idea of price to be paid to a volunteer as an approximation to the money value of suffering is to give loose rein to sympathy and caprice. . . . From the whole case, the question is, what is a reasonable allowance for the suffering necessarily endured?[17]

In *Goodhart v. Pennsylvania Co.*,[18] the Pennsylvania Supreme Court continued the semantical debate that was begun in *Baker* and repeated the distinction drawn in *Baker* in more clear-cut terms. Its language, although not directed to the per diem approach, clearly would proscribe the use of this technique by plaintiff's counsel:

> An instruction that leaves the jury to regard it as an independent item of damages to be compensated by a sum of money that may be regarded as a pecuniary equivalent is not only inexact, but it is erroneous. The word "compensation," in the phrase, "compensation for pain and suffering," is not be be understood as meaning price, or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury.[19]

In *Schenkel v. Traction Co.*,[20] the Pennsylvania Supreme Court recognized that the *Goodhart* decision, instead of clarifying the law, had produced more confusion, and undertook to make more explicit the meaning of the earlier decision. The court quickly dispelled the belief nurtured by the *Goodhart* decision that pain and suffering had been abolished as a separate item of damages.[21] Instead, the court indicated that *Goodhart* was designed to still the growing practice of "suggesting to the jury as a measure of damages what amount of money they or any other third party would individually take to submit to an injury similar to the one before him,"[22] *i.e.* the "Golden Rule" argument. If the court had stopped there, the decision would stand as a condemnation of the per diem idea only inferentially. However, the court went further, and after stressing compensation as the test in measuring the award for pain and suffering, interpreted *Goodhart* as condemning any consideration of pain and suffering as an item "having a fixed value or equivalent of a market price."[23] In this language, as well as that in *Goodhart*, the court struck at the assumption underlying the per diem technique, that pain and suffering can be equated to a fixed value.

17. 142 Pa. at 505, 21 Atl. at 980.
18. 177 Pa. 1, 35 Atl. 191 (1896).
19. 177 Pa. at 2, 35 Atl. at 192.
20. 194 Pa. 182, 44 Atl. 1072 (1899).
21. 194 Pa. at 185-186, 44 Atl. at 1073.
22. 194 Pa. at 185, 44 Atl. at 1073.
23. 194 Pa. at 185, 44 Atl. at 1073.

The importance that the court attached to the distinction between "compensation" and "price" or "worth" is apparent in its later decision of *McClane v. Pittsburgh Railways Co.*[24] In *McClane*, the lower court had instructed the jury that, "As a result of the injury you will allow Mr. McClane compensation for the pain and suffering he has undergone from June 1903, to the present time, and also the present worth of pain, if any is likely to be suffered in the future."[25] Instead of analyzing the difficult legal issue presented by the lower court's charge, the court ignored it and reverted to its fascination with the compensation-price dispute. The charge itself presented the court with the opportunity to resolve the difficult issue of whether damages for future pain and suffering should be reduced to present worth. Although the majority of the cases dealing with the problem have declined to require such a reduction,[26] there have been persuasive arguments made in its favor.[27] Instead of dealing with this issue, the court's attention was drawn instinctively to the lower court's use of the word "worth." Therefore, instead of an intelligent consideration of the problem of reducing future damages for pain and suffering to present worth, the court's opinion substitutes an exercise in linguistics which is summed up in the following sentences:

> Compensation expresses a thought easily grasped, however difficult it may be to work it out in practical results. Worth is the quality of a thing which gives it value, and is easily comprehended. The two words are not equivalent, and we have no right to suppose that the jury would so regard them. Except as otherwise instructed, the average juror's understanding of worth would associate it with the idea of cost or price.[28]

Twenty years after *McClane*, and forty years after *Baker*, the distinction that these cases had etched out with such painful precision was erased in *Herb v. Hallowell.*[29] The Pennsylvania Supreme Court, in the *Herb* case, did not formally overrule *Baker* and its successors, instead, it expanded the concept of compensation until the idea of price or worth was absorbed into it. Faced with a lower court charge that instructed the jury to determine what the pain and suffering of the plaintiffs was "worth," and with the conflict with the *Baker-McClane* terminology that this charge produced, the court reconciled the conflict by stating that:

> It is, of course, the duty of the trial judge to make it clear to the jury that in awarding damages for pain and suffering the award must be limited "to compensation and compensation alone."

24. 230 Pa. 29, 79 Atl. 237 (1911).
25. 230 Pa. at 29, 79 Atl. at 237.
26. 25 C.J.S., *Damages* § 93 (1966).
27. 43 MINN. L. REV. 832, 836 (1959).
28. 230 Pa. at 34-35, 79 Atl. at 238.
29. 304 Pa. 128, 154 Atl. 582 (1931).

> Collins v. Leafey, 124 Pa. 203, 214. Though "compensation" is an approved word in instructions in cases of this kind, it is not an infallible guide to a just verdict. Jurors may differ widely in their conception of the word "compensation." One juror might hold that no amount of money could justly compensate one for acute pain and suffering; another might hold that even a small sum of money would be just compensation in such a case. "Compensation" is defined in Webster's New International Dictionary as "amends; an equivalent of recompense; that which makes good the lack or variation of something else. Among the synonyms set out are 'recompense, satisfaction, set-off.' " Appellant objects particularly to that part of the charge which says: "Consider the testimony carefully and see what you think the pain and suffering of Mr. Herb and his wife, and little boy, are worth." Appellant argues that this is "error in that it places a price or money equivalent upon pain and suffering." This is rather close to what a plaintiff is seeking when he asks reasonable monetary compensation for pain and suffering. While it may be inappropriate to use "price" in connection with pain and suffering, for price is something else, yet "price" is also defined in Webster's New International Dictionary as a "recompense," which, as we noted above, is a dictionary synonym for "compensation." . . . While the word "price" or "worth" in instructions as to damages for pain and suffering has been condemned and the use of the word "compensation" has been approved. . . , it is a matter of observation that few philologists get on juries. We believe that only a philologist would appreciate the difference between the word "compensation" and the word "price" or "worth" as used in instructions to be considered by juries in assessing damages for the elements referred to.[30]

With this curt observation, the court laid to rest a distinction that was the handiwork of forty years of case law.

The Pennsylvania cases discussed in the preceding paragraphs usually are considered to be the earliest judicial repudiation of the per diem technique. The quotations reproduced demonstrate, however, that the court was preoccupied with the language of the court's instructions concerning pain and suffering, rather than with an argument that had been used by counsel in his closing argument. However, when read together and in the context of contemporaneous cases, they leave little doubt that the per diem technique was not proper argument in a Pennsylvania court. For instance, in another series of cases the Pennsylvania Supreme Court condemned counsel's reference to the ad damnum clause

30. 304 Pa. at 133-135, 154 Atl. at 584-85.

of the complaint.[31] And in two decisions reported in 1921, the court, by way of dicta, criticized the practice of counsel's suggesting fixed amounts for intangible items of damage. In *Joyce v. Smith*,[32] the court said: "The amount of damages claimed is not to be determined by an estimate of counsel, but by the jury from the evidence before them, and any suggestion to the jury of an arbitrary amount is highly improper. . . ."[33]

Finally, in *Bullock v. Chester & Darby Telford Road Co.*,[34] the court expressed its conviction that "The verdict in an action for tort should be a deduction drawn by the jury from the evidence and not a mere formal adoption of calculations submitted by counsel. . . ."[35]

None of the cases that have been analyzed to this point deal with the per diem technique in a definite manner. However, they do justify the supposition, commonly-held, that prior to 1951 the per diem argument had been condemned only by the appellate courts of Pennsylvania.

The per diem argument remained in this state of uncontroversial uncertainty for several years after 1951. In subsequent decisions, other states critized the technique in a more direct fashion than the earlier Pennsylvania cases, and the popularizers of the technique continued to encourage its use. For instance, on June 2, 1951, Melvin Belli lectured on the subject before the Mississippi Bar Association. It has been stated that this was the first time the argument was proposed east of the Mississippi, but this seems improbable in view of the consideration given to variations of the technique by the Pennsylvania courts.[36] Nevertheless, it remained for the Supreme Court of New Jersey, in its 1958 decision in *Botta v. Brunner*,[37] to lay the foundation for the current controversy over the use of a mathematical formula.

In *Botta*, the Supreme Court of New Jersey introduced most of the arguments that have been used by later decisions criticizing the per diem technique. The *Botta* opinion is undoubtedly the earliest definitive treatment of the subject; so determined was the court to deal fully with the issue that it requested supplemental briefs from counsel "in order to deal more fully with a problem which is currently vexing the trial courts. . . ."[38] In order

31. See, *e.g.*, Resse v. Hervey, 163 Pa. 253, 29 Atl. 907 (1894); Hollinger v. York Railways Co., 225 Pa. 419, 74 Atl. 344 (1909); Carothers v. Pittsburgh Railways Co., 229 Pa. 558, 79 Atl. 134 (1911).

32. 269 Pa. 439, 112 Atl. 549 (1921).

33. 269 Pa. at 443, 112 Atl. at 551.

34. 270 Pa. 295, 113 Atl. 379 (1921).

35. 270 Pa. at 298, 113 Atl. at 380.

36. MORRIS, DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES, "A REVIEW OF THE 'PER DIEM' ARGUMENT-JUNE 2, 1951 TO DATE" 287 (1965).

37. 20 N.J. 82, 138 A.2d 713 (1958).

38. 20 N.J. at 84, 138 A.2d at 715.

to reach this issue, the court even ignored an obvious ground for reversal which would have by-passed the per diem issue. Counsel for plaintiff had argued to the jury that ". . . you must place yourself in the position of this woman."[39] Unlike the Pennsylvania court, the New Jersey Supreme Court recognized this argument as an issue separate from the use of the per diem formula, and even disapproved the statement on the basis of prior New Jersey law. However, the court ignored this obvious ground for reversal in order to "base our disposition of the appeal on a more extensive treatment of the problem"[40] which it felt was demanded by the "sufficient current urgency"[41] of the problem.

In disposing of the problem, the court advanced three major arguments against the formula approach. The greatest emphasis was placed on the fact that the monetary valuations used in the formula had no foundation in the evidence, and would not have been received in evidence even if an expert could be found who might provide such testimony. In adopting this view, the court placed itself in direct conflict with the Appellate Division, which in the opinion appealed from, had felt that the argument was a proper inference that counsel should be permitted to argue. Incidental to this point, the court stressed that any monetary valuations necessarily had to be speculative, and would not take into account the variations in the pain thresholds in different individuals. Finally, the court declared that the argument was inequitable to defense counsel, who presumably had no way of coping with it.

The court buttressed these arguments with a full-scale discussion of all of the Pennsylvania cases cited previously in this article, leaving the unmistakable impression that Pennsylvania had repeatedly repudiated the per diem technique. It also alluded to statements made by Belli in his Mississippi lecture, and to some extent the fervor of the opinion seems to have been motivated by the court's distaste for Mr. Belli's suggestions.

In spite of the spirited and analytical approach which the court applied in considering the mathematical argument, the opinion is a disappointment because of what is left after the disposal of the per diem technique. The court concluded its opinion with a reaffirmation of the traditional instruction that the jury is to award "fair and reasonable compensation" for pain and suffering, apparently feeling that it was not necessary to inquire any further into the adequacy of this phrase in providing a guideline for a jury to translate broken bones into dollars and cents.

Publication of the *Botta* opinion drew the attention of the legal world to the problem, and a rash of law review articles quickly appeared analyzing the implications of the decision. The majority of these articles were

39. 20 N.J. at 87, 138 A.2d at 718.
40. 20 N.J. at 88, 138 A.2d at 719.
41. 20 N.J. at 86, 138 A.2d at 717.

openly hostile to the *Botta* decision, and the reasoning underlying it.[42] In addition, more and more appellate courts have found themselves confronted with the issue, and a sharp divergence in judicial outlook has resulted. At present, probably more courts have ignored the reasoning of *Botta* than have followed it. Without outlining qualifications that might have been imposed, the following states have approved the per diem approach: Texas, Michigan, Nevada, Utah, Washington, Mississippi, Alabama, South Carolina, Florida, Maryland, Kentucky, Iowa, Arkansas, Colorado, California and Minnesota.[43] One state, Oklahoma, has given a very reluctant and heavily qualified approval.[44] Following Pennsylvania and New Jersey, the following states have disapproved the technique: Kansas, North Dakota, Delaware, Missouri, West Virginia, Virginia, Illinois, Hawaii, New York, Wisconsin and New Hampshire.[45]

In the succeeding section of this article, consideration will be given to the reasoning advanced by the critics and by the proponents of the mathematical formula, and the arguments underpinning the cases cited above will be explored.

THE CONCEPTUAL BASIS FOR THE PER DIEM CONTROVERSY

In the decisions and publications discussed in the preceding section of this article, most of the implications of the per diem technique were subjected to close scrutiny. The detractors of the per diem argument have voiced their objections to it repeatedly, and the proponents of the tech-

42. See, *e.g.*, 43 MINN. L. REV. 832 (1959); 19 OHIO ST. L.J. 380 (1958); 38 N.C. L. REV. 289 (1960); 33 So. CAL. L. REV. 24 (1959); 4 VILL. L. REV. 137 (1958).

43. Wright v. Chandler, 231 S.W.2d 789 (Tex. 1950); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Johnson v. Brown, 75 Nev. 432, 345 P.2d 754 (1959); Olsen v. Preferred Risk Mutual Ins. Co., 11 Utah 2d 23, 354 P.2d 574 (1960); Jones v. Hogan, 56 Wash.2d 23, 351 P.2d 153 (1960); Four-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1945); Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956); Edwards v. Lawton, 136 S.E.2d 708 (S.C. 1964); Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Eastern Shore Public Service Co. v. Corbett, 227 Md. 411, 177 A.2d 701 (1962); Louisville & Nashville R.R. Co. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Corkey v. Greenberg, 114 N.W.2d 327 (Iowa 1962); Grossnickle v. Village of Germantown, 30 Ohio St. L.J. 96, 209 N.W.2d 442 (1965); Vanlandingham v. Gartman, 367 S.W.2d 111 (Ark. 1963); Newbury v. Vogel, 379 P.2d 811 (Colo. 1963); Boutang v. Twin City Motor Bus Co., 80 N.W.2d 30 (Minn. 1956); Beagle v. Vasold, P.2d (Cal. 1966).

44. Missouri-Kansas-Texas R.R. Co. v. Jones, 354 P.2d 415 (Ok. 1960).

45. Caylor v. Atchison, Topeka & Santa Fe Ry. Co., 138 Kan. 210, 368 P.2d 28 (1962); King v. Railway Express Agency Inc., 107 N.W.2d 509 (N.D. 1961); Henne v. Balick, 146 A.2d 394 (Del. 1958); Faught v. Washam 329 S.W.2d 588 (Mo. 1959); Crum v. Ward, 122 S.W.2d 18 (W.Va. 1961); Certified TV and Appliance Co. v. Harrington, 201 Va. 109, 190 S.E.2d 126 (1959); Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962); Franco v. Fujimoto, 390 P.2d 740 (Hawaii 1964); Paley v. Brust, 250 N.Y.S.2d 356 (1964); Affet v. Milwaukee & Suburban Transportation Co., 11 Wis. 2d 604, 106 N.W.2d 274; Chamberlain v. Palmer Lumber Co., 104 N.H. 221, 183 A.2d 806 (1962).

nique have written extensively in its defense. The issues presented by the use of the argument have been so clearly defined by the incessant debate that it was possible for Chief Judge Carrol, the author of the opinion in *Ratner v. Arrington*,[46] to enumerate in systematic order the arguments presented by each side. Repetition of the arguments has not stilled the debate, however, and the impression is left that most of the decisions are not the result so much of cerebral activity as they are the product of the unconscious reaction of the court to the possibility of prejudice resulting from use of the argument.

Underlying the objections advanced by the detractors of the technique is an implicit distrust of the jury's reaction to it. This distrust is nurtured by a belief that the technique, when used by skillful plaintiff's counsel, will not only dupe the twelve members of the jury, with its apparent logic, but that defense counsel is powerless to combat the injustice that will result. This assumption was pointed out by Justice Solfisburg, in his dissenting opinion in *Caley v. Manicke*,[47] when he stated that:

> The criticism of the so-called per diem argument is grounded in an inherent distrust of the adversary system of jury trials. While such distrust is not new, the detractors of this system have failed to provide a more satisfactory substitute.[48]

Bottoming most of the arguments presented by the proponents of the techinque is a deep dissatisfaction with the inadequacies of the present standard for determining damages for pain and suffering. Underlying their approach to the problem is the assumption that counsel should be permitted to explore the subject in depth, and that there is at least as much injustice inherent in the flaccid phrase presently used to measure such damages as inheres in the per diem argument.

These two conflicting values lie at the center of the debate over the use of this technique. On the one hand, it is contended that wide latitude should be permitted counsel in his closing argument, and that any limitation imposed on his ability to argue fully the damages to be awarded for pain and suffering strikes at a precious prerogative of counsel. On the other hand, it is claimed that the court has a duty to confine the arguments closely to the evidence presented, and that when counsel enters an area of argumentation which involves the sympathetic reaction of the jury to the plaintiff's injury, and possible resulting prejudice to the defendant, the court must maintain a watchful eye and a strict hand to obviate injustice.

In opposing the use of the per diem technique, its detractors have not rested their case on the advantages of the present standard. In fact, they

46. 111 So. 2d 82 (1959).
47. 24 Ill. 2d 390, 182 N.E.2d 206 (1962).
48. *Id.* at 210-211.

have said very little in defense of the present system of measuring such damages merely by informing the jury that they must award "fair and reasonable compensation." The only praise that has been expressed for the present standard, by the courts criticizing the per diem technique, appears in *Caley v. Manicke*,[49] and indicates the difficulty that is involved in defending the present method. In that case, the court eulogized the present test for such damages as "a determination reached by a subjective process which is easier to comprehend than to define. . . ."[50]

The critics of the per diem technique, instead of resting their argument on a comparison with the present method, have relied on three major contentions. Basically, the opponents of the technique have attacked it on a procedural basis, combining this with a criticism of the factual assumptions of the technique, and a declaration of the possible ways prejudice can result to defense counsel.

The argument most frequently repeated by the critics of the per diem technique is that the numerical portions of the formula used by plaintiff's counsel go beyond the scope of the evidence presented. They reason that traditional procedural principles require counsel to confine his argument to testimony in the record, and that the figures adduced by plaintiff's counsel are arbitrary, speculative, and outside the ambit of the record.[51] Therefore, they conclude that the argument is procedurally unsound.

Closely aligned with this argument is a subsidiary and supporting contention. Criticism has been leveled against the per diem technique on the ground that no expert would be permitted to testify to the figures that are presented by plaintiff's counsel in his closing argument. Therefore, the per diem technique is deemed to permit counsel for plaintiff to do by argument what he cannot do by way of evidence.[52]

In countering this argument, the supporters of the per diem technique claim that its detractors misconstrue the scope of the latitude that is given to counsel in closing argument. They point out that counsel, in closing, can discuss many issues that are not proper matters for admission into evidence. For instance, they argue, counsel can comment on the credibility of witnesses, or draw the conclusion that a defendant was negligent, but these matters could not be made part of the evidentiary basis of the case. Traditionally, counsel is permitted not only to argue the evidence in the record, but all inferences flowing from it.[53] Their rebuttal is best summarized in the words of one writer, who concisely stated the case in favor of the per diem argument:

49. *Ibid.*
50. *Ibid.*
51. 11 DEFENSE L.J. 10 (1962).
52. 4 VILL. L. REV. 137, at 139 (1958).
53. 12 RUTGERS L. REV. 522 (1958).

> The argument that the evidence fails to provide a foundation for the per diem suggestion is similarly unconvincing. All concede that the jury must observe, weigh and then ultimately equate the evidence of pain with a monetary sum, but this same evidence is said not to contain a basis for inference by counsel of a total or per diem worth.[54]

In addition to attacking the per diem technique on procedural grounds, the foes of the argument have assailed the factual assumptions underlying the technique. They point out that the technique presupposes a constant amount of pain over a stated period of time, which must be compensated at a uniform rate, and contend that this assumption does not conform to the true nature of pain. They argue that pain thresholds differ from individual to individual, and that the per diem technique treats all pain equally. The argument is fallacious they claim, because it does not take into account the fact that pain diminishes with time, varies from day to day, can be overshadowed in individuals by the distraction of other events, and overlooks the ability of persons to adapt to pain.[55]

As a corollary to these arguments, some critics of the per diem technique take an additional step and claim that pain, by its very nature, has no numerical value, cannot be interchanged with money, and therefore cannot be measured by a fixed standard or formula.[56] This position prompted one writer to remark that some critics of the per diem technique would appear to favor abolition of damages for pain and suffering altogether.[57]

In rejoinder to these views, the proponents of the argument have taken several positions. One point of view disagrees with the description of how pain is supposedly experienced, and argues that:

> . . . [P]ain is often experienced not in a sudden subsiding flash but in pain-streaked minutes, hours, and a gray succession of days or in a throbbing, ceaseless chain reaction. If pain is endured moment by moment, day by day, why should not the jury determine damages to compensate for such pain by allotting X amount to each moment, each day, each link in the chain of pain?[58]

More prosaically, the Supreme Court of Ohio has pointed out that the

54. 19 Ohio St. L.J. 780, at 782 (1958).

55. See, *e.g.*, Henne v. Balick, 146 A.2d 394 (Del. 1958); Crum v. Ward, 122 S.E.2d 26 (W.Va. 1961).

56. Affett v. Milwaukee & Suburban Transportation Co., 11 Wis. 2d 604, 106 N.W.2d 274 (1960).

57. Grossnickle v. Village of Germantown, 30 Ohio St. L.J. 2d 96, 209 N.E.2d 422 (1965).

58. 29 NACCA L.J. 187, at 189 (1962).

loss of a part of the body or the permanent interruption of normal activities, is a constant source of suffering.[59]

In answer to the other parts of this argument, it has been pointed out that the jury can accommodate the gradual diminution of pain to the formula approach by using a declining rate.[60] In addition, the proponents of the technique criticize these attacks as trivial, and feel that the acumen of the jury is badly underrated by the opponents of the technique in presenting this line of argument. They point out that it would be perfectly proper for defense counsel to make these arguments to the jury, and that the jury would be in a position to give proper consideration to them.

The corollary that is drawn by many critics of the per diem technique has come under heavy attack from the argument's supporters. They point out the lack of logic in stating that pain has no numerical value, and cannot be interchanged with money in the face of the fact that the jury must act as though the opposite were true.[61] The point has been made that the defendant is not in a position to attack the factual assumptions behind the formula approach, and to stress the variability and inexactness of pain, because the defendant caused the injury. "Relief given to an injured plaintiff can only be approximate. But a defendant whose negligence has caused the plaintiff's injury cannot be heard to complain that such damages cannot be ascertained with exactness."[62]

Finally, the proponents of the technique claim that:

> The very absence of a fixed standard by which pain can be measured and translated into compensation by a jury is a persuasive reason why counsel should be permitted to illustrate to the jury the manner in which he arrived at the total sum claimed for pain and suffering.[63]

The arguments discussed above represent a rationalized facade covering probably the most significant objection of the formula approach. This objection stems from the concern that use of the technique prejudices defense counsel, and unerringly leads to astronomical personal injury awards. Although this hidden motivation is left unarticulated in many of the opinions, it is possible to analyze the premises of the objection.

Several of the cases rejecting the per diem approach have bitterly condemned it on the ground that it is a clever strategy devised solely to

59. Grossnickle v. Village of Germantown, 30 Ohio St. L.J. 2d 96, 209 N.E.2d 422 (1965).
60. 43 MINN. L. REV. 832, at 835 (1959).
61. Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961).
62. King v. Railway Express Agency Inc., 107 N.W.2d 509 (N.D. 1961).
63. Newbury v. Vogel, 379 P.2d 811, at 814 (Colo. 1963).

mesmerize juries and produce large verdicts. These denunciations range from the relatively mild statements in *Henne v. Balick*,[64] to the effect that the argument gets figures before the jury that they would otherwise not have considered, to the more vitriolic expressions in *Caylor v. Atchison, Topeka & Santa Fe Ry. Co.*,[65] where the court said: "The purpose of this technique is blatantly to achieve the 'more adequate award,' a synonym to all but the naive for 'the more than adequate award.' "[66]

The concern that use of the per diem argument will lead to higher personal injury awards is predicated on three objections to the technique. Initially, it has been claimed that the argument is a powerful appeal to the prejudices and sympathies of the jury. This contention has been expressed most aptly in *Crum v. Ward*,[67] where the court said:

> Practical, psychological and philosophical factors do enter the picture. The power of suggestion, and its immeasurable effects, are well known. To merely suggest the existence of pain and suffering, especially pain and suffering of a fellow human being, engenders or activates such complex emotions as sympathy, prejudice, compassion and caprice that exist in every normal person, including each of the twelve jurors, and creates a fervent, resolute desire to relieve or aid the sufferer. The effects of such a suggestion are greatly enhanced or multiplied when made by the action of the trial judge in telling the jury, which he effectively does by approving or permitting the argument, that the suggestion of a money value of pain and suffering is a reasonable argument and is justifiable, notwithstanding the complete absence of facts related to money value thereof.[68]

One writer expressed this conviction more mundanely, claiming that the per diem technique is used along with all the other "hidden persuaders" that characterize the "Hollywood-type trial."[69]

In addition, it has been claimed that higher personal injury awards will result from use of the technique because it discourages the jury from thinking about damages for pain and suffering, and encourages them to accept the figures supplied by counsel.[70] For instance, in *Caley v. Manicke*,[71] the court criticized the formula approach on the ground that

64. 164 A.2d 394 (Del. 1958).

65. 138 Kan. 210, 368 P.2d 28 (1962).

66. *Id.* at 55.

67. 122 S.E.2d 18 (W.Va. 1961).

68. *Id.* at 26-27.

69. MORRIS, DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES, "A REVIEW OF THE 'PER DIEM' ARGUMENT-JUNE 2, 1951 TO DATE" 287 (1965).

70. 4 VILL. L. REV. 137, at 139.

71. 24 Ill. 2d 390, 182 N.E.2d 206 (1962).

a formula is by definition a conventional rule or method for doing something, and as such, would lend little enlightenment to the jury.

Climaxing these arguments is the frequently repeated plaint that the per diem technique places counsel for defendant in a difficult dilemma, which prevents him from coping with the argument. Critics of the technique claim that counsel for defendant is faced with the alternatives of not arguing the point, and implying that he cannot refute counsel's suggestion, or of arguing the point, and fortifying the implication that the law recognizes pain and suffering as capable of being evaluated on a per diem basis.[72]

In reply, the advocates of the technique contend that the claimed prejudice to defense counsel is questionable.[73] They point out that there is nothing to prevent counsel for defendant from either suggesting a lower unit value than used by plaintiff's counsel, to suggest a different method for calculating damages, or to argue the weaknesses and inappropriateness of the formula approach.[74] It has also been suggested that the idea that pain and suffering can be measured in money may have value to defense counsel, presumably by disclosing and making subject to argument the figures that might be awarded for this item of damages.[75]

The advocates of the technique have vehemently denied that the use of the argument leads to exorbitant awards by pointing to the barriers that stand in the way of an excessive verdict. They claim that the argument is not binding on the jury, which is free to reject or to accept it, and that the court will indicate in its instructions that the unit valuations are not evidence, but merely opinions tendered by counsel. They argue that the danger of large verdicts is exaggerated, and that experience with the per diem technique does not bear out the fear that it produces excessive awards. It is noteworthy that in many of the reported decisions dealing with the formula, defense counsel raised its use as a point on appeal, but did not argue the excessiveness of the verdict.[76] No statistics have been kept that would justify the assertion that higher verdicts result from use of the technique. Even if an occasional unjustifiable award does result, it is still subject to the supervisory control of the trial court, or an appellate court, which have the ability to reduce a verdict for excessiveness.[77]

In addition, it has been claimed that the per diem technique is a two edged sword, which must be handled gingerly by counsel for plaintiff.

72. 6 DEFENSE L.J. 3, at 13.
73. 19 OHIO ST. L.J. 780, at 782.
74. 29 NACCA L.J. 187, at 189 (1962).
75. 41 B.U.L. REV. 432, at 436.
76. See, *e.g.*, Caley v. Manicke, 24 Ill. 2d 390, 182 N.E.2d 206 (1962).
77. 12 RUTGERS L. REV. 522, at 523.

Juries know that the valuations in the formula are the opinions of counsel, and that counsel has an interest in the outcome of the litigation. If the unit valuations impress the jury as unreasonable, the plaintiff's counsel suggesting them runs the risk of the jury ignoring them, or worse, penalizing the plaintiff for greed.[78]

In contrast to the critics, the proponents of the per diem technique rest their case, to a large extent, on a denunciation of the inadequacies in the present method of arriving at damages for pain and suffering. In addition to countering the objections noted above, they have subjected the present test of damages to close analysis, and court after court has been swayed by the fact that the traditional test gives the jury very little guidance. It has been condemned on the ground that it requires the jury to reach its award through a process of intuition which has no rational basis. It has been said that, although life is lived in unit terms, the jury is required by the traditional standard to think in lump terms, and to measure the size of the whole without reference to the size of its parts.[79] Their approach, of weighing the merits of the traditional standard against the merits of the per diem technique, is best summed up in the *Flowers* case, where the court, faced with the choice, opted for the per diem because:

> It would seem that suggesting some concrete formula, although it must be admitted to be purely a suggestion, in order to give the jury some basis to arrive at its verdict is preferable to leaving it entirely at sea to fix a damage figure en masse "by guess and by golly."[80]

CONCLUSION

It would be pleasant to say that the attention given to the per diem argument by the appellate courts of this country, since 1951, has ended the controversy, and has produced a clear-cut pattern indicating the trend of judicial thought. Unfortunately, the controversy continues, as evidenced by two recent decisions which have upheld the use of the technique.[81] These decisions, while emphasizing the continuing virulence of the problem, perhaps indicate as well that the pattern taking shape portends greater liberality in the use of the argument.

A review of the historical background that underlies the issue, and the arguments advanced by both sides, indicates that the problem does not admit of easy solutions. Clearly, persuasive arguments can be mustered to support either side of the debate, and the division of authority

78. Texas and New Orleans R.R. Co. v. Flowers, 336 S.W.2d 907 (Tex. 1960).

79. NICHOLS, *"Anti-Botta Thoughts in An Antibiotic Age,"* BELLI SEMINAR (1960).

80. Texas and New Orleans R.R. Co. v. Flowers, 336 S.W.2d 907 (Tex. 1960).

81. See, Beagle v. Vasold, P.2d (Cal. 1966); Baron Tube Co. v. Transport Insurance Co., F.2d (5th Cir. 1966).

is still great enough that it affords little solace to believers in solving legal problems by resorting to stare decisis. In the final analysis, the personal predilections and background of the members of the reviewing court probably are the decisive factors behind most of the decisions which have recently been reported. The complete airing of all sides of the debate, which has resulted because of the concentration on the problem in the last decade, has prevented any single argument from gaining sufficient force to persuade a court looking for an intellectual solution to the alternating contentions.

In this article, no attempt has been made to advocate one side over the other, or to denigrate either side of the controversy. Instead, it is hoped that this exposition of the historical development of the problem, and review of the positions maintained by each side, will shed some light on the nature of the controversy, and clarify the ramifications of the problem.